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SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT, PETITIONER

v.

ROBERT CHARLES BREITUNG, RESPONDENT

Court of Appeals Cause No. 38869-3-II
Superior Court of Pierce County, No. 07-1-03884-3
The Honorable Thomas Felnagle

Supplemental Brief of Petitioner

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ORIGINAL

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the majority of the court below inappropriately focus on one aspect of trial counsel's performance rather than reviewing the entire record and assessing his performance as a whole, as required by ***Strickland v. Washington***?

2. Whether failure of a sentencing court to comply with the notice provision in former RCW 9.41.047 acts as a per se bar to a charge or conviction of Unlawful Possession of a Firearm?

B. STATEMENT OF THE CASE.

1. Procedure

On July 24, 2007, the Pierce County Prosecuting Attorney charged Robert Breitung (the defendant) with two counts of assault in the second degree, one count of unlawful possession of a firearm in the second degree (UPF2), and one count of possession of a stole firearm. CP 1-2. The case went to trial. The defendant was convicted of two counts of assault in the second degree and one count of UPF2. CP 43, 45, 47.

The defendant appealed his conviction. The Court of Appeals, Division II, reversed the conviction in a published decision: ***State v. Breitung***, 155 Wn. App. 606, 230 P. 3d 614 (2010).

2. Facts

On July 19th 2007, Ossie Cook and Richard Stevenson, two mechanics, were test-driving a truck they were working on. 4 RP 285. As they test drove the truck, they stopped at a store to purchase cigarettes. 4 RP 296. While at the store, they noticed a blond woman get into a black car. 4 RP 297.

They drove to nearby Pipeline Road in Pierce County to test the brakes on the gravel portion of that road. 4 RP 285. As they were leaving Pipeline Road, Breitung walked out into the middle of the road ahead of the truck. 4 RP 302. According to Cook and Stevenson, as they approached Breitung, he pulled a gun from behind his back. 4 RP 303-304. Breitung then went to the driver's side of the vehicle and pointed the gun at them. *Id.* Cook described the gun as a dark gray or silver gun with spiraled channeling in the barrel. 4 RP 303. He also said he believed the gun to be an automatic large caliber gun, ".44 or bigger." *Id.*

Stevenson generally confirmed Cook's account. He bought the cigarettes at the store. 4 RP 342. They were testing the brakes on the truck they were working on. 4 RP 343. He saw Breitung in the road, with a gun. 4 RP 345. Stevenson described the gun to a sheriff's deputy and at trial as having a silver or gray slide with squared edges and a black body and resembled his handgun, a .40 caliber Smith & Wesson. 4 RP 347, 349-350. Stevenson testified that the defendant pointed the gun directly at them. 4 RP 354.

As he pointed the gun at Cook and Stevenson, Breitung told the men to stop following his girlfriend and threatened to "blow your F'ing brains out." 4 RP 304. Stevenson recalled that the defendant threatened to kill them. 4 RP 351. Cook then noticed the black car he had seen at the smoke shop parked nearby. 4 RP 305. After Breitung's threat, Stevenson and Cook drove a few blocks away and called the police, giving a detailed description of the gun that Breitung had pointed at them. 4 RP 352.

Pierce County Sheriff deputies responded to Breitung's residence. 3 RP 161, 4 RP 237. Breitung then approached the deputies. He admitted to the deputies and at trial that he had a confrontation with two people in a vehicle. 3 RP 163, 4 RP 238. However, he claimed that he had pulled out and pointed a microscope lens at the vehicle, not a gun. Breitung claimed that he pulled the microscope top from his pocket and pointed it at the vehicle as if he had a gun, so that the men would stop. 3 RP 164, 4 RP 238.

He asserted that once the men came to a stop, he placed the microscope top back in his pocket, approached the vehicle, asked them what the problem was. He told them that they were scaring his girlfriend; and asked why they had followed her home. 5 RP at 424. When the men did not respond, Breitung testified that he told them to leave before there was "a bigger problem." 5 RP at 424. Breitung denied pointing a gun at Cook or Stevenson and denied threatening to kill them. 5 RP 425.

After telling the deputies his side of the story, Breitung went to the trailer and retrieved the microscope lens to show the deputies. 3 RP 166. The deputies asked Breitung whether he owned a gun and he admitted that he had a rifle and some handguns, including a handgun with a black body with a silver slide. 3 RP 165, 202. As the deputies talked with Breitung, his girlfriend went into the trailer and retrieved a Taurus .45 caliber semiautomatic handgun (Exh. 2), which matched the description that Cook and Stevenson had reported. 3 RP 174, 4 RP 241. Breitung admitted that the gun was his. 3 RP 177.

C. ARGUMENT.

1. THE DECISION BELOW FAILS TO GIVE PROPER DEFERENCE TO A TRIAL ATTORNEY'S STRATEGIC DECISIONS; DEFICIENT PERFORMANCE IS NOT SHOWN SIMPLY BECAUSE A TRIAL STRATEGY IS RISKY OR UNSUCCESSFUL.

a. The ***Strickland*** standard.

Recently, in ***State v. Grier***, 171 Wn. 2d 17, 246 P. 3d 1260 (2011), this Court reaffirmed its adherence to the standard set forth in ***Strickland v. Washington***, 466 U.S. 668, 691, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984) under the Sixth Amendment for reversal of criminal convictions based on ineffective assistance of counsel. The defendant has the burden to show both deficiency of counsel and prejudice thereby. ***Strickland***, at

687; ***Grier***, at 332-33. The Court rejected the same three-prong analysis the Court of Appeals used in the present case. ***Grier***, at 32.

In ***Grier***, this Court recognized that the Court of Appeals used the same cases to decide ***Breitung*** as the Court of Appeals had in the lower ***Grier*** decision. 171 Wn. 2d at 37. Therefore, this Court's decision in ***Grier*** controls the present case, as well.

b. The defense strategy in ***Breitung*** was reasonable.

Competency of counsel is determined based upon the entire record below. ***State v. McFarland***, 127 Wn. 2d 322, 335, 899 P. 2d 1251 (1995). The reasonableness of counsel's actions is judged on the facts of each case. ***State v. Benn***, 120 Wn. 2d 631, 633, 845 P. 2d 289 (1993). The reviewing court must defer to the trial counsel's decisions to pursue or forgo a particular defense theory when the decision falls within the wide range of reasonable strategies or tactics. *See*, ***Strickland***, 466 U.S. at 689.

Defense counsel in the present case decided to pursue an acquittal-only tactic, arguing that no assault actually occurred. 5 RP 424. This is analogous to the strategy followed in ***State v. Hoffman***, 116 Wn. 2d 51, 112, 804 P. 2d 577 (1991). In ***Grier***, this Court recognized that a defendant may choose to deny the charges and pursue an acquittal. 171 Wn. 2d at 39.

Trial counsel in the present case argued that the defendant did not point a gun at the victims' car and did not threaten them. 5 RP 424. Where a lesser included offense instruction would weaken the defendant's claim of innocence, the failure to request such an instruction is a reasonable strategy. ***Strickland***, 466 U.S. at 691. Assault includes an intentional act that creates apprehension in another. *See*, ***State v. Elmi***, 166 Wn. 2d 209, 215, 207 P. 3d 439 (2009). Here, if counsel had requested an instruction on a lesser degree of assault, the defense would have had to concede that the defendant had assaulted the victims, i.e. had committed an act that created apprehension. This would have weakened the defendant's case.

The reasonableness of the defense strategy may be determined, or significantly influenced, by the defendant's statements. ***Strickland***, 466 U.S. at 691. Here, counsel was faced with strong evidence and a client who steadfastly denied it. The victims both identified the defendant as the assailant. 4 RP 301-302, 345. They both testified that the defendant stopped them and pointed a gun at them. 4 RP 303, 345. The victims both described the gun in detail, as being a large caliber, silver and black semiautomatic pistol. 4 RP 305, 333, 348-349. One victim described it as similar to a gun he owned. 4 RP 348-349. At trial, Stevenson was shown the microscope tube (Exh. 1). 4 RP 350. Stevenson said that he had never seen it before and that the defendant had not displayed it to them. *Id.*

The defendant admitted confronting the victims. 4 RP 423-424. But, he claimed that he pointed a microscope tube at them to get them to stop. 4 RP 238, 423-424. Once they stopped, he put the tube back in his pocket. 4 RP 424. He said that he only told the two men to leave the area. 3 RP 164, 4 RP 424. He specifically denied pointing a gun or threatening the two men in any way. 4 RP 425.

The victims called police almost immediately. Sheriff's deputies arrived and questioned the defendant. He showed them the microscope tube. 4 RP 238, 240. Eventually, the defendant admitted that he owned a semi-automatic pistol. His girlfriend retrieved the pistol, a large caliber black and silver pistol, which matched the description given by the victims. 4 RP 239, 247.

The defendant decided to take the stand. He admitted that he confronted the victims and told them to leave the area. 5 RP 423-424. He denied ever having a gun with him or threatening them. 5 RP 425. The defense called two witnesses to bolster the defendant's version of events. *See*, 6 RP 309 ff, 417 ff.

In closing argument, defense counsel reminded the jurors of the state's heavy burden. 6 RP 544-546. He argued that the defendant's witnesses were credible, disinterested parties. 6 RP 551. He pointed out weaknesses and discrepancies in the victims' testimony. *See, e.g.*, 6 RP 548, 549-550, 565, 557. He pointed out that the victims never identified the defendant. 6 RP 560-561.

Pointing out that the defendant cooperated with police, did not try to hide anything, and did have a microscope; he made the best of the defendant's seemingly implausible explanation. 6 RP 564.

Here, as outlined above, the State had a strong case. The witnesses and circumstantial evidence pointed strongly to the defendant's guilt. The defendant, along with his lawyer, chose to proceed with the defense that he did not assault the two victims. The strategy to deny the charges and take the stand may have been unsuccessful and therefore ill-advised. However, it does not show ineffective assistance of counsel. Legitimate, but unsuccessful trial strategy or tactics do not establish that counsel was ineffective. ***State v. Lord***, 117 Wn.2d 829, 883, 822 P.2d 177 (1991). The fact that the jury convicted the defendant does not mean trial counsel was ineffective, it merely means counsel's trial strategy was unsuccessful.

2. THE COURT OF APPEALS INCORRECTLY HELD THAT THE MUNICIPAL COURT'S FAILURE TO NOTIFY THE DEFENDANT OF THE FIREARM PROHIBITION WAS A PER SE VIOLATION OF RCW 9.41.047(1) BARRING PROSECUTION FOR UNLAWFUL POSSESSION OF A FIREARM.

The majority in the opinion below put the issue this way: "[W]hether failure to comply with former RCW 9.41.047(1) alone warrants reversal." ***Breitung***, 155 Wn. App. at 622.

RCW 9.41.047 requires that when one is convicted of an offense making him ineligible to possess a firearm, the convicting or committing

court shall notify the person, orally and in writing, that he may not possess a firearm unless his or her right to do so is restored by a court of record. RCW 9.41.047. The statute does not provide a remedy for a convicting court's failure to comply with the statute's notice requirement.

On this topic, the Supreme Court has said: "Ignorance of the law is no defense, and Washington case law provides that knowledge of the illegality of firearm possession is not an element of the crime." ***State v. Minor***, 162 Wn.2d 796, 802, 174 P.3d 1162 (2008). The only exception to this policy occurs when a government entity has provided affirmative, misleading information to the individual. *Id.* "[A] denial-of-due-process defense arises where a defendant has reasonably relied upon affirmative assurances that certain conduct is lawful, when those assurances are given by a public officer or body charged by law with responsibility for defining permissible conduct with respect to the offense at issue." ***State v. Leavitt***, 107 Wn. App. 361, 371, 27 P.3d 622 (2001).

In ***Leavitt***, the court held that the convicting court misled the defendant when it "failed to advise Leavitt that he lost his right to possess firearms for an indefinite period of time as required by statute, gave Leavitt written notice of an apparently one-year firearm-possession restriction, and implicitly allowed Leavitt to retain his concealed weapons permit." ***Leavitt***, 107 Wn. App. at 372. These combined actions of the convicting court in "these unique circumstances" served to mislead the

defendant, requiring a reversal of his conviction. 107 Wn. App. at 372-373. In ***Minor***, the court found that the failure to check the appropriate paragraph in the order affirmatively represented to the defendant that those paragraphs did not apply to him. ***Minor***, 162 Wn.2d at 803.

The results in ***Minor*** and ***Leavitt*** can be contrasted with the decision in ***State v. Carter***, 127 Wn. App. 713, 112 P.3d 561 (2005). In ***Carter***, the defendant had been adjudicated as a juvenile of a burglary offense. The juvenile court in the predicate offense failed to advise the defendant that he was disqualified from possession of firearms and the order contained no notification provision. 127 Wn. App. at 720. Sometime after the disposition order was entered, the defendant was contacted by law enforcement and a loaded revolver was found clipped to the inside of the waistband of his jeans. 127 Wn. App. at 715. The Court in that instance held that due process requires dismissal of an unlawful firearms possession charge only when a court misleads a defendant into believing that his conduct was not prohibited and the defendant demonstrates prejudice. 127 Wn. App. at 720-721. Since the defendant in ***Carter*** had not shown that he was affirmatively misled, the trial court's denial of his motion to dismiss was proper even though the predicate offense court failed to comply with RCW 9.41.047. 127 Wn. App. at 721.

The Court of Appeals has examined similar cases where there was a failure to advise the defendant of the firearm prohibition because the

sentencing court was in another state. In ***State v. Blum***, 121 Wn. App. 1, 4, 85 P.3d 373 (2004), the defendant was convicted of a felony in Colorado. The court did not notify him that he was prohibited from possessing firearms. He returned to Washington. Circumstances led to him being charged with UPF. He did not argue that he had been misled, only that he had not been notified per RCW 9.41.047. Division 2 rejected this argument and reversed the trial court. 121 Wn. App. at 5.

In ***State v. Stevens***, 137 Wn. App. 460, 153 P. 3d 903 (2007), the defendant had been convicted of rape in Oregon. The sentencing court did not revoke his right to possess firearms, and did not notify him that the law was different in Washington. Oregon issued him a hunting license and permitted him to hunt with firearms there. The defendant moved to Washington, bringing his firearms. He was eventually charged with several counts of UPF. He moved to dismiss, asserting lack of notice under RCW 9.41.047. Division 3 rejected this argument. The Court found that he had not shown that he had been misled; citing ***Leavitt***. He had not shown that he had "relied on any statements or omissions". ***Stevens***, at 469.

Here, as in ***Blum*** and ***Stevens***, the defendant did not show any actions or inactions of a government entity which affirmatively misled him into believing that he could lawfully possess firearms. As in ***Carter***, there was no language on the order that even mentioned a right to possess firearms. 127 Wn. App. at 720. The Court in ***Minor*** specifically noted

that had the order omitted any language regarding the firearms prohibition, the State's argument that the defendant had provided no evidence of being misled by the predicate offense court would be more persuasive. ***Minor***, 162 Wn.2d at 803. Furthermore, defendant did not demonstrate any prejudice from the failure of the Tacoma Municipal Court to comply with the statutory requirements of RCW 9.41.047.

Here, the Court of Appeals specifically found that the defendant was not misled:

> [T]he order here does not mention the firearm prohibition. While it fails to inform Breitung of the prohibition, it does not affirmatively mislead him.

Breitung, 155 Wn. App. at 621. Nevertheless, the Court of Appeals went on to hold that the municipal court failure to notify per se prohibited the charge. *Id.*, at 624.

Minor permitted a very narrow exception, not a blanket rule. The holding in ***Breitung*** creates a blanket rule. The opinion conflicts with the Supreme Court's holding in ***Minor*** and the Court of Appeals' own rule in ***Leavitt***. As the dissent below pointed out: "If the legislature wishes to restrict convictions to those who have been warned, it may do so. Lacking that, the usual rule prevails and Breitung's ignorance of the law is no excuse." ***Breitung***, 155 Wn. App. at 625 (Penoyer, J., dissenting). The Court of Appeals must be reversed.

D. CONCLUSION.

Defense counsel's strategic decisions were reasonable in light of the defendant's account of the events and steadfast denial of any wrongdoing. The defendant has not demonstrated deficiency of counsel and prejudice. Likewise, the defendant failed to demonstrate that he was misled and prejudiced when the Tacoma Municipal Court failed to advise him that his conviction prohibited firearm possession. The Court of Appeals decision erred in reversing the defendant's convictions. The State respectfully requests that the Court of Appeals be reversed and the convictions be affirmed.

DATED: May 25, 2011.

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Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant ~~and appellant~~ c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

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Submitted by: T. Roberts
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Please call me at 253/798-7426 if you have any questions.

Therese Kahn
Legal Assistant to T. Roberts